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Golden Star & Ors v Ling Peek Hoe & Anor and other appeals

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS A-02–2975–12 OF 2012, A-02 (IM)-1147–05 OF 2013 AND A-02–102–01 OF 2013
LIM YEE LAN, ABANG ISKANDAR AND VERNON ONG JJCA
13 MARCH 2015

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Civil Procedure — Appeal — Appeal against judgment of High Court — Allegation of fraudulent misrepresentation — Moneylending — Whether relationship between parties moneylending or sale and purchase — Whether High Court decided on non-pleaded issue of undue influence — Standard of proof in fraud or fraudulent misrepresentation cases

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Three appeals arose in relation to the decision of the High Court. The claim canvassed on the argument of fraudulent misrepresentation between parties. The High Court had held that the relationship between the first plaintiff and the defendants was that of money lending and not sale and purchase; the second defendant's modus operandi with the help of the first defendant, was to loan money to borrowers by way of using sale and purchase agreements and other standard documents; the second defendant failed to comply with the mandatory requirements under the Moneylenders Act 1951 ('the Act') to keep accounts in permanent books, supply information as to the state of the loan and attestation of promissory notes; the first and third defendants were in a relationship of active confidence to the first plaintiff; the first and third defendants imposed undue influence on the first plaintiff into signing the sale and purchase documents; and the 'irresistible conclusion' was that the first plaintiff had succeeded in proving fraudulent misrepresentation by the defendants. The defendants canvassed the appeal on three main grounds: the judicial commissioner ('JC') had decided the case on a non-pleaded issue, namely that of undue influence; the JC applied the wrong standard of proof in finding that the case of fraud or fraudulent misrepresentation was made out; and there was no evidence to support the JC's finding that there was misrepresentation.

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Held, allowing the appeals with costs:

(1) The JC erred in applying the wrong standard of proof in holding that the plaintiffs had proven their case against the defendants for fraudulent misrepresentation and or fraud in impugning the title in respect of the three properties. The Court of Appeal's findings was premised on the JC's oral decision and in his written judgment where he employed two

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different tests, the balance of probabilities and the 'irresistible conclusion' tests, both of which were not the correct tests in proving fraudulent misrepresentation and or fraud. The JC ought to have used the beyond reasonable doubt test. On this ground alone, being an error of law, the appeal ought to succeed (see paras 33–34).

(2) Even after subjecting all the evidence by using the beyond reasonable doubt test, the plaintiffs failed to prove fraudulent misrepresentation and or fraud beyond reasonable doubt. The JC had decided on an unpleaded issue, ie undue influence that was never pleaded by the plaintiffs. The JC had therefore misdirected himself on the law which misdirection had occasioned a prejudice against the defendants (see paras 35–36).

[Bahasa Malaysia summary

Tiga rayuan berbangkit berkaitan kepada keputusan Mahkamah Tinggi. Tuntutan berdasarkan penghujahan salah nyata fraud antara pihak-pihak. Mahkamah Tinggi telah memutuskan bahawa hubungan di antara plaintif pertama dan defendan-defendan adalah pinjaman wang dan bukan jual beli; modus operandi defendan kedua dengan bantuan defendan pertama, adalah untuk meminjamkan wang kepada peminjam-peminjam melalui perjanjian jual beli dan bukan dokumen standard yang lain; defendan kedua gagal untuk mematuhi dengan kehendak mandatori di bawah Akta Pemberi Pinjaman Wang 1951 ('Akta') untuk menyimpan akaun dalam buku-buku kekal, memberikan maklumat mengenai keadaan pinjaman dan pengakusaksian nota janji; defendan pertama dan kedua adalah dalam hubungan kepercayaan aktif kepada plaintif pertama; defendan pertama dan ketiga mengenakan pengaruh tak wajar ke atas plaintif pertama hingga menandatangani dokumen jual beli; dan 'irresistible conclusion' adalah bahawa plaintif pertama telah berjaya membuktikan salah nyata fraud oleh defendan-defendan. Defendan-defendan mendasarkan rayuan atas tiga alasan utama: pesuruhjaya kehakiman ('PK') telah memutuskan kes atas isu yang tidak diplidkan, iaitu pengaruh tak wajar, PK menggunapakai standard pembuktian yang salah dalam memutuskan bahawa kes fraud atau salah nyata fraud telah dibuat; dan tidak terdapat keterangan untuk menyokong dapatan PK bahawa terdapat salah nyata.

Diputuskan, membenarkan rayuan dengan kos:

(1) PK tersilap dalam menggunapakai standard pembuktian yang salah dalam memutuskan bahawa plaintif-plaintif telah membuktikan kes mereka terhadap defendan-defendan bagi salah nyata fraud dan fraud dalam mempersoalkan hak berkaitan ketiga-tiga hartanah tersebut. Dapatan Mahkamah Rayuan adalah berdasarkan keputusan lisan PK dan dalam penghakiman bertulisnya di mana beliau menggunapakai dua ujian berasingan, imbangan kebarangkalian dan ujian-ujian 'irresistible conclusion', kedua-duanya bukan ujian yang betul dalam membuktikan salah nyata fraud dan atau fraud. PK sepatutnya menggunakan ujian

melampaui keraguan munasabah. Atas alasan ini sahaja, adalah kesilapan undang-undang, rayuan patut berjaya (lihat perenggan 33–34).

(2) Walaupun selepas memfokuskan kesemua keterangan dengan menggunakan ujian melampaui keraguan munasabah, plaintif-plaintif gagal untuk membuktikan salah nyata fraud dan atau fraud melampaui keraguan munasabah. PK telah memutuskan atas isu yang tidak diplidkan, iaitu pengaruh tak wajar yang tidak pernah diplidkan oleh plaintif-plaintif. PK oleh itu salah arah diri dari segi undang-undang yang mana salah arah telah menyebabkan prejudis terhadap defendan-defendan (lihat perenggan 35–36).]

Notes

For cases on appeal against judgment of High Court, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 902–915.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and Another Appeal [1995] 2 MLJ 770, CA (refd)
Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301, FC (refd)
Dato Othman bin Hashim v KKW Auto Centre [2012] 5 MLJ 756, HC (refd)
Datuk Jagindar Singh & Ors v Tara Rajaratnam [1983] 2 MLJ 196, FC (refd)
Fadil bin Bachok @ Sanusi v PP [2013] 2 MLJ 391; [2012] 9 CLJ 65, CA (refd)
Jayaraman & Ors v PP [1982] 2 MLJ 273 (refd)
Juraimi bin Husin v Public Prosecutor [1998] 1 MLJ 537; [1998] 2 CLJ 383, CA (refd)
Kho Yian Kim & Ors v Then Fah Chin & Anor [1992] MLJU 89; [1993] 1 CLJ 497, HC (refd)
Lee Cheong Fah v Soo Man Yoke [1996] 2 MLJ 627, HC (refd)
Pengurusan Danaharta Nasional Bhd v Dato' Sng Chee Hua & Anor [2006] 6 MLJ 477, HC (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

Bankruptcy Act 1967
Moneylenders Act 1951
National Land Code ss 302(2)(a), 340(2)(a), Form 19B
Rules of Court 2012 O 18 r 12

Appeal from: Civil Suit Nos 22–203 of 2006 and 22–45 of 2008 (High Court, Ipoh)

Yunus Ali (Norazali Nordin and Joseph Yeo with him) (Chan & Assoc) in Civil

Appeal Nos A-02–2975–12 of 2012 and A-02(IM)-1147–05 of 2013 for the appellant.

A Iruthaya Raj (Raj Selva with him) (Raj Selva & Co) in Civil Appeal No A-02–102–01 of 2013 for the appellant.

Edmund Lim Yun (Hong Chong Hang with him) (Hong Chew Kong & Co) in Civil Appeal Nos A-02–2975–12 of 2012 and A-02(IM)-1147–05 of 2013 for the respondents.

Edmund Lim Yun (Hong Chong Hang with him) (Hong Chew Kong & Co) in Civil Appeal No A-02–102–01 of 2013 for the respondents.

Vernon Ong JCA:

INTRODUCTION

[1] The three appeals by the defendants in the court below relate to a decision of the learned judicial commissioner ('JC') after a full trial of the following two suits which were consolidated on 24 Frebruary 2010.

[2] Suit 22–203 of 2006 ('Suit 203') was instituted by Ling Peek Hoe and Ling Boon Huat against Ding Siew Ching, Golden Star, Ding Toh Biew, Ding Toh Gien and Ding Toh Lei. The plaintiffs' claim is for, inter alia, (i) a declaration that the sale and purchase agreements, tenancy agreement and transfer of three properties is null and void by reason of misrepresentation, fraud, forgery and/or insufficient or void instrument; and (ii) for damages against Ding Siew Ching an advocate and solicitor for failure to exercise reasonable professional care, skill and diligence.

[3] Suit 22–45 of 2008 ('Suit 45') was instituted by Ding Toh Lei, Ding Toh Biew and Ding Toh Gien against Ling Peek Hoe. The plaintiffs' claim is for damages and for injunction against Ling Peek Hoe for trespass.

[4] The learned JC allowed the claim in Suit 203 and declared that the sale and purchase agreements and the transfers of the three properties to be null and void and for damages to be assessed. The claim in Suit 45 was dismissed.

[5] In this grounds of judgment, Ling Peek Hoe and Ling Boon Huat shall be referred to as the first plaintiff and the second plaintiff respectively ('the plaintiffs'); Ding Siew Ching as the first defendant, Golden Star as the second defendant, Ding Toh Biew as the third defendant, Ding Toh Gien as the fourth defendant and Ding Toh Lei as the fifth defendant ('the defendants').

[6] Appeal No 2975 is by the second to fifth defendants against the said decision allowing the plaintiffs' claim. Appeal No 1147 is an appeal by the third

to fifth defendants against the consequential orders of the learned JC pursuant to the said decision. Appeal No 201 is the appeal by the first defendant against the said decision.

BRIEF ACCOUNT OF THE SALIENT FACTS

[7] The first plaintiff was the registered owner of a shophouse at No 59, Taman Ilmu, Sitiawan ('the No 59 shophouse'). He was also the registered owner of 10/15 undivided share in two pieces of agricultural land ('the two Kampung Selamat properties'). The words 'the three properties' appearing hereinafter refer to the No 59 shophouse and the two Kampung Selamat properties. The registered owner of the remaining 5/15 undivided share of the two Kampung Selamat properties was his mother Owee Sing Bee @ Wong Sing Bee. The second plaintiff is the son of the first plaintiff.

[8] The first defendant was at the material time practising as an advocate and solicitor and the sole proprietor of a legal firm.

[9] The second defendant Golden Star is a licensed moneylender firm; the third to fifth defendants are the partners of the second defendant.

[10] In 1995, the first plaintiff obtained a loan of RM590,000 from Hong Leong Bank Bhd ('HLBB'). As security for the repayment of the loan, all the three properties and one other property ('the No 27, Jalan Omar property') were charged in favour of HLBB.

[11] In the middle of 1996, the first plaintiff approached the second defendant for a loan. After furnishing the third defendant with copies of the title deeds to the three properties, the first plaintiff was taken by the third defendant to the first defendant's law office. In the presence of the first defendant, the third defendant handed over some loan documents which have been prepared by the first defendant for the first plaintiff to sign before the loan can be approved. After the first plaintiff signed the documents, he was asked by the third defendant to pay the legal fees of RM150 for the loan documents. Subsequently, the first plaintiff and the third defendant returned to the second defendant's office where the third defendant issued a cheque of RM5,000 to the first plaintiff. Interest on the loan was agreed at 4% per month. Subsequently, the first plaintiff obtained further loans from the second defendant; the total amount of the loans came to about RM500,000.

[12] In order to regularise the loan instalment payments which were in arrears, around the end of 1996, the first plaintiff sold the No 27, Jalan Omar property and HLBB received RM330,000 towards part payment of the outstanding loan account.

[13] Pursuant to a sale and purchase agreement dated 10 March 1997, the first plaintiff agreed to sell to the third, fourth and fifth defendants the No 59 shophouse for RM200,000. To finance the purchase, the third, fourth and fifth defendants obtained a loan from Standard Chartered Bank and RM160,000 was paid to HLBB. The title of No 59 shophouse was subsequently transferred to the third, fourth and fifth defendants.

[14] Pursuant to two sale and purchase agreements dated 27 August 1997 and 29 August 1997 respectively, the first plaintiff agreed to sell his 10/15 undivided shares in the two Kampung Selamat properties to the third, fourth and fifth defendants for RM406,000.

[15] By another sale and purchase agreement dated 23 December 1998, the first plaintiff sold the remaining 5/15 undivided share which he inherited from his late mother under her will to the fifth defendant for RM120,000.

[16] The proceeds of sale from the two Kampung Selamat properties and the remaining 5/15 undivided share were utilised to redeem the HLBB charges over the two Kampung Selamat properties. The third to fifth defendants were then registered as the proprietors of the two Kampung Selamat properties on 1 April 1999.

[17] In 2003, pursuant to a sale and purchase agreement dated 19 February 2003, the second plaintiff purchased back the No 59 shophouse from the third, fourth and fifth defendants for RM310,000. The second plaintiff was subsequently registered as the proprietor of the same.

THE PLAINTIFFS' CASE

[18] In essence, the plaintiffs' claim is based on misrepresentation, fraud or conspiracy to defraud as follows:

(a) the first and third defendants misrepresented to the first plaintiff that the documents he was asked to sign in 1996 were loan documents;

(b) the defendants wrongfully settled the first plaintiff's loan with HLBB and redeemed the three properties without the first plaintiff's knowledge or consent;

(c) the defendants misrepresented and misled the first plaintiff into believing that under the loan transaction they had the right to redeem and retain the original title deeds to the three properties until the first plaintiff settled his loan in full with the second defendant; and

(d) in 2003, the first plaintiff discovered that the defendants had transferred the two Kampung Selamat properties without his knowledge or consent.

[19] As against the first defendant, the claim is that she failed to exercise all reasonable professional care, skill and diligence and that she had breached the terms of her retainer with the plaintiffs, in particular:

(a) the first defendant failed to properly advise the plaintiffs on the purported sale and purchase agreements for the three properties from the first plaintiff to the third, fourth and fifth defendants; and

(b) the first defendant failed to advise the plaintiffs that the purported transactions and redemption of the No 59 shophouse was in contravention of the Moneylenders Act 1951 ('the MLA 1951').

FINDINGS OF THE LEARNED JUDICIAL COMMISSIONER

[20] The findings of the learned JC may be summarised as follows:

(a) the relationship between the first plaintiff and the defendants was that of money lending and not sale and purchase;

(b) the second defendant's modus operandi with the help of the first defendant, was to loan money to borrowers by way of using sale and purchase agreements and other standard documents such as general vouchers, Form 19B, consent letters, transfer forms, etc;

(c) the first plaintiff had signed the documents under the impression that they were loan documents when in fact the documents were sale and purchase documents;

(d) without the knowledge of the first plaintiff, the first defendant had attended to the transfer of the three properties to the third, fourth and fifth defendants using the sale and purchase documents signed by the first plaintiff at the first defendant's office;

(e) the second defendant failed to comply with the mandatory requirements under the MLA 1951 to keep accounts in permanent books, supply information as to the state of the loan and attestation of promissory notes;

(f) the first and third defendants were in a relationship of active confidence to the first plaintiff;

(g) the first and third defendants imposed undue influence on the first plaintiff into signing the sale and purchase documents; and

(h) the 'irresistible conclusion' was that the first plaintiff has succeeded in proving fraudulent misrepresentation by the defendants.

A THE DEFENDANTS' SUBMISSION

[21] Learned counsel for the defendants canvassed the appeal on three main grounds:

B (a) the learned JC decided the case on a non-pleaded issue, namely that of undue influence;

(b) the learned JC applied the wrong standard of proof in finding that the case of fraud or fraudulent misrepresentation was made out; and

C (c) there is no evidence to support the learned JC's finding that there was misrepresentation.

[22] On the first ground, it was submitted that not only must undue influence be specially pleaded, the particulars thereof must also be pleaded D (Bullen & Leake, The Common Law Library No 5 at p 884; O 18 r 12 of the Rules of Court 2012; *Pengurusan Danaharta Nasional Bhd v Dato' Sng Chee Hua & Anor* [2006] 6 MLJ 477; and *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 at p 155).

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[23] On the second ground, learned counsel for the defendants argued that the plaintiffs were challenging the third, fourth and fifth defendants' title invoking s 340(2)(a) of the National Land Code by alleging misrepresentation, fraud or conspiracy to defraud. The standard of proof for fraud is beyond F reasonable doubt (*Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301 (FC)). Misrepresentation for the purposes of s 302(2)(a) of the NLC means fraudulent misrepresentation (*Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196 at p 201; *Lee Cheong Fah v Soo Man Yoke* [1996] 2 MLJ 627 at p 629).

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[24] In his oral grounds given on 28 November 2011, the learned JC found that on a balance of probabilities the relationship between the first plaintiff and the second to fifth defendants was one of borrower and lender. However, the learned JC did not mention which standard of proof he applied in relation to H the claim of misrepresentation, fraud and conspiracy to defraud.

[25] In his grounds of judgment dated 28 June 2013 (some seven months later), the learned JC also did not direct his mind on any standard of proof. Instead, the learned JC adopted the words 'irresistible conclusion'. The phrase I is not a test for standard of proof. The same phrase has been used on many occasions by courts in civil cases where the standard of proof is on a balance of probabilities (*Dato Othman bin Hashim v KKW Auto Centre* [2012] 5 MLJ 756 at p 770; *Kho Yian Kim & Ors v Then Fah Chin & Anor* [1992] MLJU 89; [1993] 1 CLJ 497 at p 500).

[26] On the third ground, it was submitted that there was no misrepresentation because the first plaintiff knew throughout that the documents he was signing were sale and purchase documents. It is not the plaintiffs' case that the sale and purchase documents were sham documents to camouflage the money lending transaction. Their claim is that the documents signed were sale and purchase agreements instead of loan documents. The first plaintiff's assertion that he did not understand English or Malay is suspect. SD9, the principal of SMK Tok Perdana testified that the first plaintiff was a student at his school from 1965–1968 and that he studied up to form three; adding that the English language was one of the subjects taught at the school. The first plaintiff had written letters to the defendants requesting for the sale and purchase agreements. Learned counsel also alluded us to numerous other instances detailed in the written submission to illustrate that the first plaintiff's credibility was questionable.

[27] Learned counsel then referred to the first plaintiff's own contemporaneous documents which negated his own case. In particular, he referred to exhs D47A and D47B, the two letters written by the first plaintiff to the first defendant about the sale and purchase agreements. Further, by his own admission, the first plaintiff had previous experience in property transactions; saying that in the 1990s he had purchased several landed properties and used three to four different lawyers.

[28] Learned counsel also argued that the plaintiffs' failure to cross-examine the defendants' witnesses on a crucial part of the defence case must tantamount, in law, to an acceptance of the witnesses' testimonies: (i) revision of purchase price as listed in exh D170 in relation to questions 23 and 24 of SD11's witness statement, (ii) on offer to sell the No 59 shophouse in early 1997 as per question 5 of SD11's witness statement, (iii) on offer to sell the two Kampong Selamat properties in mid-1997 as per question 8 of SD11's witness statement, (iv) on seriousness of encumbrances on the two Kampung Selamat properties as per questions 9 and 35 of SD11's witness statement, (v) failure to cross-examine SD6 on her evidence, (vi) failure to cross-examine SD8 on the consent by HLBB to allow the first plaintiff to sell the encumbered Kampung Selamat properties, (vii) failure to cross-examine SD11 on whether exhs D57, D66, D67, D77 and D78 were executed in April 1996, (viii) failure to ask SD1 whether she had asked the first plaintiff to sign what was represented as a loan document allegedly prepared by her, and (ix) failure to cross-examine SD11 on the first plaintiff's first visit to first defendant's office in July 1996 (*Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and Another Appeal* [1995] 2 MLJ 770 (CA)).

[29] Learned counsel also argued that the fact that the first plaintiff knew and consented to the sale and purchase transactions is further corroborated by the fact that the first plaintiff did not include the Kampung Selamat properties as an asset under his declarations in 2004 as required under the Bankruptcy Act 1967 ('the BA 1967').

THE PLAINTIFFS' REPLY SUBMISSION

[30] On the first issue, learned counsel for the plaintiffs argued that even though undue influence and active confidence are not expressly pleaded, they can be implied from the material facts as pleaded.

[31] On the second issue relating to the standard of proof, it was submitted that the learned JC applied the balance of probabilities standard in finding that basis of the relationship between the parties. As to the finding of fraudulent misrepresentation, the learned JC applied the correct standard of proof even though he did not use the words beyond a reasonable doubt. Instead, the learned JC employed the words 'irresistible conclusion' which is the same standard of proof as beyond reasonable doubt in a criminal case (*Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 273; *Fadil bin Bachok @ Sanusi v Public Prosecutor* [2013] 2 MLJ 391; [2012] 9 CLJ 65 (CA); *Juraimi bin Husin v Public Prosecutor* [1998] 1 MLJ 537; [1998] 2 CLJ 383 (CA)).

[32] On the third issue, learned counsel for the plaintiffs argued that the learned JC had made the correct findings of fact. The learned JC had found that the second defendant's evidence that all documents relating to the loan with the first plaintiff had been sold as old newspapers as an afterthought. In finding fraud, the learned JC had accepted the plaintiff's evidence over the defendants'. The learned JC did not make his findings based on the demeanour of the witnesses alone. He also considered the contemporaneous documents whereby the first and third defendants' evidence contradicted each other and the terms of the sale and purchase agreement.

DECISION

[33] We have perused the appeal records and the grounds of judgment of the learned JC. We are constrained to agree with the submission of the defendants that the learned JC erred in applying the wrong standard of proof in holding that the plaintiffs had proven their case against the defendants for fraudulent misrepresentation and or fraud in impugning the title in respect of the three properties.

[34] Our finding is premised on the learned JC's oral decision and in his written judgment where he employed two different tests, ie, the balance of

probabilities and the 'irresistible conclusion' tests, both of which are not the correct tests in proving fraudulent misrepresentation and or fraud. The learned JC ought to have used the beyond reasonable doubt test. On this ground alone, being an error of law, the appeal ought to succeed.

[35] Secondly, in any event, even after subjecting all the evidence by using the beyond reasonable doubt test, we are of the view that the plaintiffs have failed to prove fraudulent misrepresentation and or fraud beyond reasonable doubt.

[36] Thirdly, we are also of the view that the learned JC had decided on an unpleaded issue, ie, undue influence that was never pleaded by the plaintiffs. The learned JC had therefore misdirected himself on the law which misdirection had occasioned a prejudice against the defendants.

[37] For the foregoing reasons, we allowed all of the three appeals with costs. The orders of the learned JC are set aside.

Appeals allowed with costs.

Reported by Afiq Mohamad Noor